STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2010
v	No. 290183 Monroe Circuit Court
CHARLES RANDALL JOHNSON, Defendant-Appellant.	LC No. 07-036567-FH

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(v). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to one to eight years' imprisonment, to be served consecutive to any sentence for which defendant was on parole when he committed the instant offense. We affirm.

In September 2007, while driving a car he borrowed from a neighbor, defendant was stopped by the police and arrested for driving with a suspended license. While defendant had nothing illegal on his person, an inventory search of the car revealed a single rock of crack cocaine concealed in the brim of a green baseball cap located on the backseat. The cocaine was packaged in a "tiny knotted baggie." Three syringes and another small baggie were also located in the vehicle.

On appeal, defendant first argues the trial court's admission of police officers' testimony regarding drug dealing and drug dealer behavior was contrary to MRE 702. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). An error in the admission or exclusion of evidence will not warrant reversal, unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Craig*, 471 Mich at 76. While defendant did object to certain of the challenged testimony on grounds of relevancy, he did not object on the basis of MRE 702. To the extent the alleged error is unpreserved, we review the same for plain error affecting substantial rights. *People v Girard*, 269 Mich App 15, 19; 709 NW2d 229 (2005).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, the arresting officer testified that he had been assigned to the Monroe narcotics investigation unit for six years, but was no longer assigned to that unit; and that he attended Michigan State Police basic and advanced narcotics school, the Drug Enforcement Agency's advanced narcotics school, and numerous drug interdiction trainings. He thereafter testified that drug dealers package their product in distinctive ways so that buyers will know the source by looking at the package, and that "some people are more familiar with it or they know by looking at it or the way it's packaged that they have an idea that it came from the same certain person or source." The officer testified that he had received information that defendant was involved in dealing crack cocaine and heroin. The officer further testified that he believed the cocaine rock found in the car to be packaged in a way that was defendant's trademark. Although defendant was wearing a different hat at the time of his arrest, the officer claimed defendant admitted the green baseball cap belonged to him, but stated that the cocaine did not.

Another officer testified that he was a 13-year veteran of the Monroe Police Department and had been assigned to the Monroe narcotics unit for seven years. He attended the Michigan State Police basic and advanced narcotics school, the Drug Enforcement Agency's advanced narcotics school, and numerous drug interdiction trainings. The officer additionally testified that drug dealers often wear distinctive clothing so that they can be readily identified as having a good product. The officer testified that he saw defendant driving the neighbor's car, while wearing the green baseball cap, just two days before the instant stop and arrest. A third officer also testified that he had seen defendant wearing a green hat similar to the one in question "a number of times."

Contrary to defendant's arguments, the testimony regarding the method of packaging drugs and defendant's appearance and clothing were relevant to his crime, and were not offered as expert testimony. A mixture containing crack cocaine in an amount less than 25 grams was found packaged in a tiny, knotted baggie in the rim of the green baseball cap located in the backseat of the car defendant was driving. Defendant was seen wearing that green cap, or one identical to it, approximately two days before his arrest. Defendant, on the other hand, testified that he did not own a green baseball cap. The trial court correctly pointed out that "[t]he only real question here is did the Defendant knowingly possess the crack cocaine?" The testimony offered by the police officers pertained directly to whether defendant knowingly possessed the crack cocaine. Defendant's substantial rights were not affected by these statements because he has not demonstrated that the outcome of the proceeding would have differed had the statements not been admitted. Defendant also cannot show that the police officers would not have been qualified as expert witnesses.

Finally, defendant was convicted following a bench trial. There was little risk of unfair prejudice from the admission of the evidence because the trial court is presumed to have followed the law, *People v Farmer,* 30 Mich App 707, 711; 186 NW2d 779 (1971), and to have weighed the probative value of the evidence. *People v Payne*, 37 Mich App 442, 445; 194 NW2d 906 (1971). The trial court did not err in admitting the testimony.

Defendant next argues the trial court erred in admitting prior bad acts evidence regarding his alleged previous involvement in drug trafficking, contrary to MRE 404(b)(1). We disagree.

"[T]his Court reviews a trial court's decision regarding the admissibility of other-acts evidence for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). Where, as here, the alleged error is unpreserved, we review the same for plain error affecting substantial rights. *Girard*, 269 Mich App at 19.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To use other acts evidence, the prosecutor must (1) offer the other acts evidence for a proper purpose pursuant to MRE 404(b)(1); (2) the evidence must be relevant under MRE 402, as enforced through MRE 104(b); (3) a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and facts appropriate for use under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, the prosecution must provide notice of its intent to use other acts evidence. MRE 404(b)(2). "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Defendant argues that the trial court improperly allowed testimony from the arresting officer regarding defendant's prior arrest for cocaine related charges, because the prosecutor did not give the requisite notice pursuant to 404(b)(2). While this may be true, it was defense counsel, not the prosecution, who asked the arresting officer if he "had [in the past] contact with [defendant] about matters relating to the charge of possessing or dealing in drugs" and opened up a line of questioning regarding defendant's prior arrest on cocaine-related charges.

Defendant also challenges the admission of testimony regarding the officer's belief that the cocaine packaging found in the green cap was distinctive of defendant's packaging, and testimony that the officer received information that defendant was involved in dealing crack cocaine and heroin. Defendant asserts that he was charged with possession, such that any evidence that he sold cocaine or heroin at some unknown time in the past was not relevant or

probative of whether he knowingly possessed the cocaine found in green cap. However, once again, evidence that defendant was previously arrested on cocaine-related charges was in response to defense counsel's questioning. Furthermore, evidence that the packaging of the cocaine found in the green cap was distinctive of defendant's method of packaging was also relevant to whether defendant "knowingly possessed" the cocaine. The testimony regarding the arresting officer's belief that the cocaine packaging found in the green cap was distinctive of defendant's packaging also demonstrated defendant's system or manner of possessing cocaine.

Once again, defendant's substantial rights were not affected by the officers' testimony because defendant has not shown that the outcome of the proceeding would have differed had the statements not been made. The police officers testified that they had seen defendant on prior occasions wearing a green baseball cap exactly the same as, or substantially similar to, the one containing crack cocaine found in the backseat of the car defendant was driving. Testimony also established that at one point defendant admitted to police to owning the baseball cap, although he denied that the cocaine belonged to him. Defendant's guilt or innocence turned mostly on the fact finder's evaluation of credibility. Absent the contested evidence, there was still sufficient evidence to convict defendant.

Defendant next argues that defense counsel was ineffective for failing to object to the expert witnesses' and prior bad acts testimony introduced by the prosecution. Having concluded that there was no erroneous admission of evidence, we necessarily reject defendant's assertion of ineffective assistance of counsel predicated on this evidence.

Finally, defendant argues the trial court erred in failing to award sentence credit against the instant sentence because the parole board did not impose any additional time to serve for his parole violation. We disagree.

Pursuant to our Supreme Court's holding in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009), defendant is not entitled to sentence credit regardless of what action was taken by the parole board with respect to the imposition of any additional time because once arrested in connection with the new felony, a parolee continues to serve out any *unexpired* portion of his earlier sentence *unless and until* discharged by the parole board. Defendant's argument is thus without merit.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto